

Statement for the Record

of



Presented by

**John Rowan
President**

Before the

House Committee on Veterans' Affairs

Regarding

Veterans Appeals Improvement and Modernization Act of 2017

May 2, 2017

Vietnam Veterans of America (VVA) is pleased to have the opportunity to present this statement for the record regarding the bill entitled “Veterans Appeals Improvement and Modernization Act of 2017.”

Vietnam Veterans of America (VVA) is **strongly opposed** to the enactment of the Veterans Appeals Improvement and Modernization Act of 2017 in its current form. While VVA certainly supports initiatives to fix the broken claims process, the solution should never be to replace a broken system with a new one that is equally flawed. The bill ignores the need for legal precedent in the VA claims process, limits due process protections, and compromises the non-adversarial, pro-veteran claims system at the convenience of VA.

While head of the Department of Veterans Affairs (VA), General Omar Bradley once stated, “[w]e are here to solve . . . veterans’ problems, not our own.” VVA believes that the proposed bill seeks to solve VA’s “problems”, to the direct detriment of veterans. In considering the merits of the bill, VVA urges Congress and stakeholders to sincerely consider if this bill will fix the fundamental problems with the current claims system. VVA believes it does not.

It is widely understood that the appeals process is in need of urgent reform, and to do nothing would be unacceptable; however, VVA urges Congress to not replace the current broken system with an equally flawed plan simply because it is too daunting to redesign a plan that directly addresses the problems facing the appeals process today. In its current form, this bill is an insult to the brave men and women who sacrificed to protect the Constitution of the United States.

I. The bill fails to address the lack of precedent in the VA claims process and decreases decision finality at all levels of appeal.

The bill fails to address the lack of a precedent-setting mechanism in the veterans benefits adjudicatory system. Even more concerning, VVA believes the new proposed framework could decrease the rate of legal precedent being set due to the erasure of the duty to assist at all higher levels of review.

One of the fundamental problems with the current claims system is that veterans who have nearly identical records will receive drastically different results. Whether a veteran’s claim is granted should depend on the claim’s merits, not on *who* happened to be adjudicating the claim that day. Sadly, the current bill does not address the need for a precedent-setting mechanism in the claims process,

which VVA believes will increase consistency in decisions, decrease the rate of appeals, and enable VA to automate similar types of claims.

Additionally, the bill permits the veteran to continue to file a supplemental claim after a decision is issued at any higher level of appeal to preserve the original effective date. Although VVA supports legislation that protects the earliest possible effective date, the bill exacerbates the current problem of the never-ending churn of cases between all levels of appeal. In theory, the bill permits a veteran to refile a supplemental claim to continue a claim after he receives a decision by the Supreme Court of the United States. Indeed, the bill creates *more* uncertainty with the finality of decisions, which VVA fears may increase the claims backlog.

II. The bill fails to address VA's inability to properly satisfy its duty to assist at the Agency of Original Jurisdiction-level.

The bill fails to address one of the fundamental problems with the claims system: VA has not yet proven itself to be able to properly apply the laws and regulations to any veterans claims file in a consistent and pro-veteran manner at the Agency of Original Jurisdiction-level. In FY 2015, 41 percent of the reasons for remands at the Board were due to a VBA error.¹ The bill does not address the high frequency of errors at the initial decision-level.

Instead, the bill proposes to increase the role of the Agency of Original Jurisdiction by eliminating the Secretary's duty to assist requirement for any higher-level reviewers or Board decisions. Additionally, the bill proposes to eliminate Decision Review Officers (DROs), who come from the ranks of the most senior raters at VBA. VVA believes this shift to rely exclusively on initial claims raters to conduct all development and duty to assist requirements, without additional required proficiency training, is a concern. Unfortunately, incompetent raters in need of urgent training will be able to hide behind the National Work Queue process, where claims are being moved around the country on a daily basis.

Although the bill proposes a higher-level review option, many higher-level reviewers will likely lack the expertise and experience of DROs due to the larger pool of staff necessary to conduct these reviews under the new framework. Notably, the bill does not indicate any competency level requirement for the higher-level reviewers. VVA fears the higher-level review process will lead to the

¹ Government Accountability Office (GAO), *VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions*, GAO-17-234 (March 2017).

rubber-stamping of rating decisions, especially since higher-level reviewers, unlike DROs, will not be subject to the Secretary's duty to assist.

III. The bill attacks the uniquely pro-veteran system at the Board due to the limited applicability of the Secretary's duty to assist.

The Secretary's duty to assist does not extend to higher-level reviews or decisions at the Board; nonetheless, the veteran may submit additional evidence and hearing testimony at the Board-level. Moreover, veteran advocates have been assured that they will still be able to submit Informal Hearing Presentations (IHPs), or written advocacy papers, for both hearing and non-hearing docketed cases prior to a final Board decision. VVA believes the absence of a duty to assist requirement at the Board will result in erroneous denials and a waste of VA resources.

The bill creates a system where a Veterans Law Judge (VLJ) may deny a claim because she does not have the duty to assist in gathering additional relevant federal documents necessary to get the claim granted. Although the veteran will have the ability to file a supplemental claim at the AOJ, it hardly seems like a pro-veteran system where an adjudicatory body *knows* of possible helpful information for a claimant, but is not able to act on this knowledge in a helpful way to the veteran. Under this new framework, the pro-claimant system would deteriorate and it is nonsensical for a VLJ to receive additional evidence for consideration, but not be able to act in the veterans favor once receiving this evidence.

VVA also is concerned about how "evidence" will be defined at the Board-level. If advocates are permitted to submit IHPs (advocacy briefs) but not "evidence" in the non-hearing track, what happens if an advocate includes a statement by the veteran in the IHP or references the existence of federal records that should be included in the veteran's file? Is that considered "evidence" if the claim is in the non-hearing track? Will it be transferred to the hearing track? Will the VLJ not consider the statement or acknowledge the existence of potentially helpful evidence? Again, VVA is concerned that this process cannot be reconciled with the pro-veteran claims process.

III. The bill encourages veterans to not exercise their right to a Board Hearing, not submit additional evidence, and not have their case reviewed by a Veterans Law Judge.

In the bill, if a veteran wishes to appeal her decision to the Board, the Veteran must choose the hearing docket or the non-hearing docket. VA has indicated that veterans who wish to exercise their right to a Board hearing will need to wait longer for a final Board decision, and veterans who do not wish to have a hearing will have their claims decided more quickly. VVA is strongly opposed to a system that disincentivizes a veteran to exercise his right to a hearing.

Additionally, VVA believes veterans that do not want a hearing, but wish to submit additional evidence should not be required to choose the hearing docket. Again, the bill is penalizing a veteran for exercising his right to add evidence to the record. VVA believes veterans wishing to only add additional evidence should be able to choose the non-hearing docket. The bill is asking veterans to forgo their due process rights so that VA may process claims more quickly.

Finally, VVA is concerned that due to the unequal treatment for veterans who wish to have a hearing or submit additional evidence and the absence of the Secretary's duty to assist at the Board, the proposed bill incentivizes veterans to file a supplemental claim at the AOJ-level instead of appealing to the Board. This may be the case, even if the AOJ clearly erred. The bill is an assault on the veteran's right to appeal and be heard by a VLJ.

IV. The bill does not give adequate consideration to the legacy appeals that have already been pending for years.

VVA is concerned about the status of the legacy appeals. The bill creates the dramatic need for additional raters at the AOJ-level, as well as the need for appropriate division of staffing to address appeals. Currently, VVA has hundreds of pending Board hearings, some of which have been pending since 2009. The Board has admitted that it will take several years for it to complete its current backlog of hearings, notwithstanding the inevitable influx of new hearing requests. VVA is concerned that the new appeals system will take priority over appeals that have languished in the system for many years. Any new claims process must ensure the legacy appeals system has adequate resources.

V. The bill should not include the Fully Developed Appeals Program due to problems with implementation with the other sections of the bill.

Although VVA recognizes the optional-nature of the Fully Developed Appeals (FDA) Program in the bill, VVA believes now is not the time to “test assumptions” relied on in development of the bill. There are numerous problems with the FDA’s concept, such as it will pull substantial resources from the already taxed Board, it will create more confusion by developing a new docket, and it does not provide unrepresented veterans the same rights as represented veterans. Additionally, the FDA Program asks the Board to conduct claim development, which is completely contrary to the other sections of the bill. In a time where Congress seeks to overhaul the entire claims process, it does not make sense to also “test” a plan that requires a completely new administrative process.

VI. The bill harms the veteran by permitting VA to prematurely “dismiss” appeals, even if the veteran intends to appeal an initial decision.

The bill permits the Board to “dismiss” any appeal that fails to identify the specific determination with which the claimant disagrees in the Notice of Disagreement (NOD). This requirement significantly raises the standard by which the veteran is required to follow to successfully appeal her decision. This is certainly not in the spirit of the non-adversarial and pro-veteran claims system.

If a veteran files a proper NOD, but VA needs additional clarification, VA should request clarification and not “dismiss” the appeal. By filing a NOD, clearly the veteran disagrees with something in the initial decision; policies should be implemented to assist the veteran in completing his appeal, not end it. This change appears to be yet another scheme to allow VA to easily dismiss appeals.

VII. The bill harms veterans by creating a “new and relevant” evidence standard with a definition that is unclear.

The bill proposes to remove the “new and material evidence” standard and replace it with a “new and relevant evidence” standard. “Relevant evidence” is defined as “evidence that tends to prove or disprove a matter in issue.” This language is so general as to be meaningless, and will certainly lead to the need for litigation to further define it. Why did VA make this definition so vague? VVA has significant concern that VA is intending to make this definition more restrictive than what was promised to stakeholders during negotiations.

VIII. The bill fails to require reporting be made available to the public.

The bill requires VA to submit a comprehensive plan to the Committee on Veterans' Affairs of the Senate, the Committee on Veterans' Affairs of the House of Representatives, and the Comptroller General of the United States no later than 90 days after the date of enactment. The bill also requires the Comptroller General to review the comprehensive plan to determine whether the plan comports with sound planning practices, identification of any improvements, and formulation of any recommendations. VA is also instructed to submit semiannual reports.

VVA believes the bill should require that VA's comprehensive plan, Comptroller General's written assessment, and any VA reports be publicly published. Moreover, the bill should require VA to timely address the recommendations made by the Comptroller General, and the actions taken should be made available to the public.

CONCLUSION

The Veterans Appeals Improvement and Modernization Act of 2017 is an attempt to improve the appeals process of VA. VVA is strongly opposed to enactment of this legislation as it does nothing to fix the fundamental problems with the appeals system. The system is broken and needs urgent repair; however, enacting a bill that will ultimately fail veterans is not a conscionable choice.

This bill is a tool for VA to more expeditiously process cases, while simultaneously limiting a veteran's due process rights. VVA believes veterans and their families will be harmed with this so-called appeals modernization bill. The immense pressure to "fix the problem" does not mean we must support a bill that does just the opposite. As the saying goes, "delay, deny, until we die"; sadly, due to the bill's inadequacies, VVA fears that enactment of this bill will be to the detriment of veterans and their families.

On behalf of VVA's members and our families, thank you for the opportunity to submit this statement for the record. For questions, please contact Rick Weidman, Executive Director for Policy and Government Affairs, at rweidman@vva.org, or Kelsey Yoon, Director of Veterans Benefits, at kyoon@vva.org.

VIETNAM VETERANS OF AMERICA
Funding Statement
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The national organization Vietnam Veterans of America (VVA) is a non-profit veterans' membership organization registered as a 501(c) (19) with the Internal Revenue Service. VVA is also appropriately registered with the Secretary of the Senate and the Clerk of the House of Representatives in compliance with the Lobbying Disclosure Act of 1995.

VVA is not currently in receipt of any federal grant or contract, other than the routine allocation of office space and associated resources in VA Regional Offices for outreach and direct services through its Veterans Benefits Program (Service Representatives). This is also true of the previous two fiscal years.

For further information, contact:

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JOHN ROWAN

John Rowan was elected National President of Vietnam Veterans of America at VVA's Twelfth National Convention in Reno, Nevada, in August 2005.

John enlisted in the U.S. Air Force in 1965, two years after graduating from high school in Queens, New York. He went to language school, where he learned Indonesian and Vietnamese. He served with the Air Force's 6990th Security Squadron in Vietnam and at Kadena Air Base in Okinawa, helping to direct bombing missions.

After his honorable discharge, John began college in 1969. He received a BA in political science from Queens College and a Masters in urban affairs from Hunter College, also from the City University of New York. Following his graduation from Queens College, John worked in the district office of Rep. Ben Rosenthal for two years. He then worked as an investigator for the New York City Council and recently retired from his job as an investigator with the New York City Comptroller's office.

Prior to his election as VVA's National President, John served as a VVA veterans' service representative in New York City. John has been one of the most active and influential members of VVA since the organization were founded in 1978. He was a founding member and the first president of VVA Chapter 32 in Queens. He served as the chairman of VVA's Conference of State Council Presidents for three terms on the national Board of Directors, and as president of VVA's New York State Council.

He lives in Middle Village, New York, with his wife, Mariann.